



United Democratic Party & another v Independent Electoral and Boundaries Commission (IEBC) & 2 others (Election Petition Appeal E017 of 2023) [2024] KECA 163 (KLR) (23 February 2024) (Ruling)

Neutral citation: [2024] KECA 163 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
ELECTION PETITION APPEAL E017 OF 2023
DK MUSINGA, K M'NOTI & M NGUGI, JJA
FEBRUARY 23, 2024**

BETWEEN

UNITED DEMOCRATIC PARTY 1ST APPELLANT

SOKOREY MAALIM ISAAKOW 2ND APPELLANT

AND

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC) 1ST RESPONDENT

ABDOW BISHAR MAALIM 2ND RESPONDENT

ABDIWELLY HAJI BUKURA 3RD RESPONDENT

(Being an application for certification and leave to appeal to the Supreme Court From the ruling of the Court of Appeal at Nairobi (Musinga, (P.), Kantai & Achode, JJ.A.) dated 10th November 2023 in Election Petition (Appeal) No. E017 of 2023)

RULING

1. The appellants/applicants in this matter, the United Democratic Movement (UDM) and Sokorey Maalim Isaakow, seek this Court's leave to appeal to the Supreme Court from the ruling of the Court dated 10th November 2023. The ruling was on a preliminary objection lodged by the 2nd respondent challenging the jurisdiction of this Court to hear second appeals from decisions of Magistrates' Courts pertaining to elections of members of county assemblies. This Court upheld the preliminary objection in its ruling, leading to the applications now before us. The background to the appeal and the reasoning in respect of the preliminary objection leading to the striking out of the appeal are succinctly captured in the ruling of this Court dated 10th November 2023.



2. In its application dated 24th November 2023, UDM, the 1st applicant, asks this Court to certify that its intended appeal and proposed grounds of appeal to the Supreme Court raise matters of general public importance which transcend the circumstances of this case and involve a matter of significant public importance. The 2nd application has also approached this Court by her application, also dated 24th November 2023, seeking similar orders, and for similar reasons, as the 1st applicant.
3. In its application and the affidavit in support sworn by Hon. Ali Ibrahim Roba, the 1st applicant states that it was aggrieved by the judgment of the High Court delivered on 17th August 2023; that it had filed a Notice of Appeal to this Court; that in response, the 2nd respondent had filed a Notice of Motion application as well as a Preliminary Objection dated 15th September 2023 challenging the jurisdiction of this Court to hear and determine the appeal; that in its decision dated 10th November 2023, this Court ruled that it lacked jurisdiction to hear a second appeal from an election petition involving the election of a Member of County Assembly and struck out the 1st applicant's notice of appeal as well as its record of appeal. The 1st applicant complains that this Court failed to consider the exceptional test of miscarriage of justice which allows this Court to intervene where there is prima facie evidence of violation of a party's constitutional right to fair hearing, as was the case in this matter.
4. The 1st applicant states that it intends to raise before the Supreme Court issues of general public importance, viz:
 - a. whether there lies a second appeal against a decision of the High Court in an election dispute for the position of Member of County Assembly, to correct manifest errors and [in]justice by the High Court that arise in the course of determining an appeal;
 - b. whether the silence of sections 75(4) and 85A of the *Elections Act* on the right to a second appeal in an election dispute for the position of a MCA prohibits the right of appeal;
 - c. whether there are conflicting decisions on the test to be applied in allowing a second appeal; what is the proper test to be applied where a statute is silent on the right of a second appeal;
 - d. whether this Court, as a superior court, has jurisdiction to intervene to rectify an apparent and obvious injustice by the High Court in an election petition appeal for the position of MCA;
 - e. whether the High Court can order de-gazettement of a lawfully nominated MCA on the basis of a Gazette Notice that has been declared null and void;
 - f. whether such a lawfully nominated MCA should be punished or disadvantaged by the court on account of a mistake or irregular alteration of the Party Lists by the IEBC;
 - g. what is the role of a nominated MCA in their nomination after publication of the Gazette Notice; what is the duty of the election court in relation to an altered and nullified Party List;
 - h. whether adverse orders can be issued against a party without giving them an opportunity to be heard.
 1. In written submissions dated 11th December 2023 highlighted by its learned counsel, Mr. Issa, the 1st applicant states that its intended appeal meets the threshold laid down in the Supreme Court decision of *Hermanus Philipus Steyn v. Giovanni Gnechi Ruscone* (2013) eKLR. It contends that the Statute Law (Miscellaneous Amendment) (No. 2) Act, 2012, which sought to amend, inter alia, sections 75(1) and 85 of the *Elections Act*, did not bar an appeal to the Court of Appeal. Further, that since sections 75(1) and 85 are silent on the right to a second appeal from a decision of the High



Court in an election petition relating to the position of an MCA, there is need for clarification whether the silence in the legislation prohibits the right of appeal despite Parliament not specifically limiting the right.

2. In submissions dated 10th December 2023, the 2nd applicant submits that her nomination was nullified by the High Court despite her not being a party in the High Court or the lower court from which the appeal in the High Court emanated; that the issues having been the subject of an election petition, they constitute a matter of general public importance, and her application before this Court therefore merits certification as one of general public importance, and meets the principles enunciated in the Hermanus Phillipus Steyn case (supra).
7. The 1st respondent, IEBC, supports the applications and has filed submissions dated 11th December 2023. It prays that the 2nd applicant's application be allowed as adverse orders were made against her while she was not a party to the matter.
8. Abdiwelly Haji Bukura, the 3rd respondent, filed an affidavit sworn on 12th December 2023 in support of the applications, contending that the applications disclose issues of general public importance and meet the tests for leave and certification Hermanus Phillipus Steyn case. He also filed submissions dated 15th December, 2023 asking the Court to allow the applications for certification.
9. Abdow Bishar Maalim, the 2nd respondent, has filed an affidavit sworn on 5th December 2023 in which he opposes the applications for certification. He avers that section 75(4) of the *Election Act* and rule 35 of the *Elections (Parliamentary and County Elections) Petition Rules 2017* provide that appeals concerning a member of a County Assembly end at the High Court. Further, that the issue of second appeals to this Court is already well settled by this Court and the Supreme Court in *Hamdia Yaro v. Shek Nuri v Tumaini Kombe & 2 others* [2019] eKLR and *Mohamed Ali Sheikh v. Abdiwahab Sheikh & 4 others* [2019]eKLR.
10. At the plenary hearing of the applications, Mr. Issa for the 1st applicant submitted that the applicant wished to raise four broad issues in its application seeking certification. First, the statutory intent and the right to a second appeal to the Court of Appeal from a decision of the Resident Magistrates' Court in a matter concerning election by nomination of a member of a County Assembly. He referred in this regard to section 85(a) of the *Elections Act*, noting that it was introduced at the same time as section 75(a) of the said Act by Act No. 47 of 2012 and a later amendment by Act No. 36 of 2016. His submission was that a reading of these two sections indicated that the statutory intent is that the right of a second appeal to the Court of Appeal was not restricted.
11. Learned counsel relied on the Supreme Court decisions in *Synergy Industrial Credit Limited v. Cape Holdings Limited* [2019] eKLR, and *Nyutu Agrovet Limited v. Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR to submit that the Supreme Court accepted the position that where the statutory intent is to restrict the right of appeal, Parliament expressly states so.
12. Counsel submitted, with respect to his second issue, that the applicant would be seeking guidance from the Supreme Court on the duty of an election court in the event that it finds that there is non-compliance by the IEBC in the gazettement of party lists under sections 34, 35 and 36 of the *Elections Act*, and whether the court should compel the 1st respondent to gazette the correct party list. A third issue was whether, where the 1st respondent makes a mistake, the 1st applicant's properly nominated member, the 2nd applicant, could be removed from her seat. The fourth issue, according to Mr. Issa, was whether this Court had jurisdiction to hear an appeal where there was, as in the case of the 2nd



applicant, miscarriage of justice in her removal by a decision of the High Court. Counsel referred this Court to the decision in *Deynes Muriithi & 4 others v. Law Society of Kenya & Another* [2016] eKLR; *Musa Cherutich Sirma v. Independent Electoral and Boundaries Commission & 2 others* [2019] eKLR and *Geoffrey M. Asanyo & 3 others v. Attorney General* [2018] eKLR to submit that in all these cases, the Supreme Court assumed jurisdiction to correct a miscarriage of justice.

13. Learned counsel, Mr. Kubai, submitted that this Court had appreciated that the 2nd applicant was not a party in the proceedings before both the Magistrates' Court and the High Court; that she was not accorded her right to fair hearing; but that the Court had dismissed her without prescribing the remedy that she should have pursued. His submission was that the 2nd applicant wishes to pose before the Supreme Court the question regarding the remedy available to her under the circumstances.
14. Mr. Kipkogei for the 1st respondent supported the applications, emphasizing that the right to a fair trial and fair hearing, protected under Articles 25 and 50 of the *Constitution*, permit no exception; that the proceedings in this case were in breach of those provisions, and the Supreme Court should be allowed to consider the question of such breach as a matter of general public importance for purposes of Article 163(4)(b) of the *Constitution*. Mr. Duane, appearing for the 3rd respondent, also supported the submission that the applications for certification should be allowed on the basis that they raise issues of general public importance.
15. Learned counsel, Mr. Jamal, appearing for the 2nd respondent, opposed the two applications. He asserted that as contended in the appeal before this Court, the Court lacked jurisdiction under section 75(a) and 85(a) of the *Elections Act* to entertain a second appeal from the decision of the Magistrates' Court; that the present applications did not merit certification as the intended appeals do not raise any issue whatsoever of general public importance as they involve only one individual, the 2nd applicant; one position, that of a nominated MCA by way of a nomination for member of county assembly; and that the subject position is not vacant.
16. Mr. Jamal further submitted that this Court could not certify the intended appeals as raising matters of general public importance, having not made a substantive determination of the appeal before it. He submitted that one of the criteria for certification is that there must be an appealable determination. There not being an appealable determination in this case, this Court having made a finding on the preliminary objection and dismissed the appeal in limine, if the Court certifies the applications, having not made a substantive determination of the applicants' appeal and the matter proceeds to the Supreme Court, the Supreme Court will be exercising original jurisdiction over the issues. Counsel placed reliance for this submission on the Supreme Court decision in *Tbika Coffee Mills v. Rwama Farmers' Co-operative Society Limited* [2020] eKLR in which the Court stated that:

“...we do not also find a merit in the applicant's arguments that it could introduce arguments specific to certification at this stage devoid of any determinations made by the superior courts. Doing so as submitted by the applicant would amount to our exercising original jurisdiction on the matter as opposed to settling a matter certified as of general public importance.”
17. We have considered the two applications before us as well as the affidavits and submissions, written and oral, in support. We note that with the exception of the 2nd respondent, all the parties urge us to certify the applications as meriting consideration by the Supreme Court on the basis that a matter of general public importance as provided under Article 163(4)(b) is involved. The 2nd respondent opposes the applications, arguing that the requirements of Article 163(4)(b) have not been met. He goes further,



raising the question whether there is any issue to certify as arising for consideration by the Supreme Court, this Court not having made a substantive determination of the applicants' appeal.

18. In our view, the sole issue that is dispositive of the applications before us is whether there is any issue of general public importance as contemplated under Article 163(4)(b) of the Constitution raised in the applications before us.
19. The principles on which this Court should certify a matter as raising an issue of general public importance for consideration by the Supreme Court were considered and enunciated in the case of Hermanus Phillipus Steyn v. Giovanni Gneccbi- Ruscone [2013] eKLR, in which the Supreme Court stated that:

“...a matter of general public importance warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: its impacts and consequences are substantial, broad-based, transcending the litigation-interests of the parties, and bearing upon the public interest. As the categories constituting the public interest are not closed, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern.”

20. In its decision in Kenya Plantation and Agricultural Workers Union v. Kenya Export Floriculture, Horticulture and Allied Workers' Union (Kefbau) represented by Its Promoters David Benedict Omulama & 9 others [2018] eKLR, this Court observed as follows with respect to the principles enunciated in the Hermanus Phillipus Steyn case:

- i. For a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;
- ii. where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest
- iii. such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;
- iv. where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;
- ii. mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163(4) (b) of the Constitution;
- iii. the intending applicant has an obligation to identify and concisely set out the specific elements of general public importance which he or she attributes to the matter for which certification is sought;
- iv. determination of facts in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.”

21. Having considered the applications before us against the principles set out above, we are not satisfied that they raise any issue or issues meriting consideration by the Supreme Court. The question whether



a second appeal lies to this Court from a decision of the Magistrates' Court relating to the election of a member of a County Assembly has been considered and determined by this Court, as well as the Supreme Court, and is now settled- see the decisions of this Court in *Joel Nyabuto Omwenga & 2 Others v. Independent Electoral and Boundaries Commission & Another* [2014] eKLR; *Isaac Oerri Abiri v. Samwel Nyang'au Nyanchama & 2 Others* [2014] eKLR; and the decision of the Supreme Court in *Hamid Yaroi Shek Nur v. Faith Tumaini Kombe & 2 Others* [2018] eKLR,

22. Secondly, the applications before us, as is evident from the averments and submissions of the applicants and the 1st and 3rd respondents, affect and concern the individual interests, rights and position of a single person, the 2nd applicant, who challenged before this Court the decision of the High Court in respect to her nomination to the County Assembly of Mandera in a slot other than the one she had been placed in the UDM party lists. Thirdly, the argument that the 2nd applicant was not a party in the two courts below, and was therefore not heard does not, of itself, render the applications fit for certification as a matter of general public importance: ultimately, this issue that the applicants assert they seek to raise before the Supreme Court still relates to the personal position and interests of an individual, the 2nd applicant.
23. It is our finding, therefore, that the applications before us are lacking in merit, and they are accordingly dismissed with costs to the 2nd respondent.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2024.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

